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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 471

CARNEGIE-ILLINOIS STEEL CORPORATION, a corporation, *Petitioner,*

v.

GEORGE P. ALDERSON, in his official capacity as Tax Commissioner of the State of West Virginia, and in his individual right, *Respondent.*

PETITION OF CARNEGIE-ILLINOIS STEEL CORPORATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Carnegie-Illinois Steel Corporation, a corporation, respectfully prays that a writ of certiorari issue to review the decision and final decree or order of the Supreme Court of Appeals of West Virginia (the same being the Court of last resort of said State), rendered and entered on the 3rd day of July,

1945, affirming a final decree of the Circuit Court of Kanawha County entered on the 16th day of February, 1944, which denied petitioner all relief prayed for in its bill of complaint and dismissed said bill. An order has been entered staying the mandate of the Supreme Court of Appeals of West Virginia pending this application. (R.p. 84).

There is presented with this application a jurisdictional statement in accordance with Rule 12 of the Revised Rules of this Honorable Court.

RECORDS AND OPINIONS BELOW

There is presented with this petition a certified transcript of the record in this case, including the proceedings in the said Supreme Court of Appeals of West Virginia to which the writ is asked to be directed, said transcript being herein referred to as "Record." The final order of the Circuit Court of Kanawha County appears on pages 69-71 of the Record, the final decree of the Supreme Court of Appeals of West Virginia on pages 72-73, and the decision or opinion of the said Supreme Court of Appeals of West Virginia on pages 73-83 of the Record. No written opinion was handed down by said Circuit Court except as contained in the final order of that Court.

JURISDICTION

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, (28 USCA, 344).

STATUTES INVOLVED

The issue here involved chiefly concerns the Business-Occupation tax of the State of West Virginia, (Chapter 11, Article 13 of the Official Code of West Virginia), the pertinent parts whereof are printed in the Record on pages 35-39, inclusive. Secondarily thereto, there is involved Chapter 5 of the Acts of the Regular Session of the Legislature of West Virginia of 1917, the pertinent parts whereof are printed in the Record on page 39. There is also involved the so-called Buck Act, (Public No. 819, 76th Congress, Chapter 787, 3rd Session) the pertinent parts of which are printed on pages 40-42 of the Record.

STATEMENT OF THE MATTER INVOLVED

There is here involved no procedural question or factual dispute. The bill of complaint (R.pp. 10-34) sets up petitioner's cause of action, the principal prayer of which is that certain activities, hereinafter more specifically set forth, should be declared immune from the Business-Occupation tax of West Virginia; that the Tax Commissioner of the State of West Virginia be enjoined from paying certain collection under said tax into the Treasury of the State; that such collection be refunded, and an injunction against future collection be perpetuated. The procedure and prayer are modeled upon that approved by this Court in *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 79 L. ed. 780, and no technical procedural questions are raised as to the bill of complaint. A demurrer going to the substance was interposed. (R.pp. 62-69). The Circuit Court of Kanawha County sustained the demurrer, petitioner refused to amend, and thereupon, the cause coming on for final hearing, upon the bill of complaint and the demurrer

thereto sustained, final decree was entered denying petitioner all relief and dismissing the bill. (R.pp. 69-71). This decree was affirmed upon appeal by the Supreme Court of Appeals of West Virginia. (R.pp. 72-73).

The United States Government owns, on a Naval Reservation at South Charleston, West Virginia, an armor plate mill or factory. Such Reservation was acquired by the Government in 1917 under an enabling act (R.p. 39) in which there was no reservation of concurrent jurisdiction in the State of West Virginia. The armor plate plant having been built, it fell into disuse until 1939 when, because of the national crisis, it was leased to the petitioner. Under the terms of the lease (R.p. 23) petitioner's use of the armor plate factory was limited solely to contracts with the Government, or with shipbuilders building warships for the Government, for the manufacture of armor plate and deck plate for warships.

Petitioner and two other companies are the only private manufacturers of armor plate and deck plate, the most difficult and technical manufacturing process of the heavy steel industry. It had been engaged for many years in this activity, having a large technical force. It is the frequent custom of the Government in procuring armor plate and deck plate, as well as other supplies, to enter into contracts of the type commonly known as a "lump sum" contract whereby the contractor is paid a fixed consideration per unit of production approved and accepted. In the present instance all of the contracts are of this character. Under this form numerous rights were reserved to the United States which are set forth in detail in the bill of complaint, particularly right to make changes, extensive rights of inspection and relative to acceptance of product, right

to make various tests, and power to require discharge or refusal of employment of persons unsatisfactory to the representatives of the Government. These contracts carried extremely detailed specifications embracing very meticulous chemical, mechanical and metallurgical requirements. All of the work was under the active supervision of authorized representatives of the Government, there being from eight to ten inspectors present daily at the armor plate factory.

The armor plate factory, which was completed in 1918, fell into disrepair, being the only factory owned by the United States Government for the production of armor plate, and this factory together with the plants and facilities of petitioner and two other companies were the sole and aggregate facilities for the manufacture of armor and deck plate in the United States and all of its dependencies. The Government had need for a greater amount of plate than could be furnished by the three private manufacturers, and determined, because of the national emergency, to put the armor plate factory at the South Charleston Reservation into operation. All the equipment and machinery installed, or to be installed (the latter by the Government) on the property were to belong to the United States Government, and this petitioner has never used any of its own equipment, machinery or tools of any kind or character except, as is alleged in the bill of complaint, on occasions when it was impossible for the Government immediately to furnish some certain tool or piece of machinery, petitioner temporarily may have used such items borrowed from its own plant, but such use was temporary and inconsequential.

The plant has been operated twenty-four hours a day, seven days a week, as have been the privately owned

plants of this company and the other two corporations making armor plate, but these facilities, constituting all the nation's capacity, were not sufficient for the Government's needs. The bill of complaint further alleges the impracticability of building and equipping armor plate factories, it being stated that no new or additional factories for the manufacture of armor plate are under construction. The production contracts were entered into after negotiations with the Government, and in arriving at the unit consideration for the product (payment being upon units accepted and delivered, approved and accepted) petitioner made a forecast of the cost and did not include the tax here claimed by the State of West Virginia. It is alleged that future contracts are likely to be entered into, and if the tax be upheld, it will include such tax as accurately as possible in any future contracts with the Government.

Because of the highly technical character of the armor plate manufactured, the Government, having no organization of trained men, would have been delayed over a long period of time in placing its factory into operation had it not availed itself of petitioner as lessee and contractee, and the factory was only capable of a part of the process of manufacture of plate (heat-treating). Accordingly, without a lease and contract, such as are here involved, the factory would not have been available at a time of great national emergency.

The tax here in issue is an imposition upon the business or activity measured by the gross value of the product in the State. Various businesses are set forth with varying percentage rates upon such value, the Section here involved being Section 2(b) (R.p. 36) upon the business of manufacturing, the rate being .39% of such

value (in the State) of the product manufactured. There is no dispute as to the category into which the activity of petitioner would fall if it were taxable at all. On pages 31 and 32 of the Record, petitioner sets forth various grounds for its activities being immune from said tax, and now presents and reaffirms the same.

QUESTIONS PRESENTED

(1) Does the State of West Virginia have constitutional power to levy a privilege tax upon the activity of petitioner, such being under contracts with the Government for the manufacture of armor plate and as lessee of the Government of an armor plate factory, using Government tools and facilities, all of which would otherwise have not been available to the United States in the exercise of a sovereign function during a time of national crisis?

(2) Does the tax here in question constitute an interference with the exercise of the sovereign functions of the United States, or place an unconstitutional burden thereon?

(3) Is petitioner in its capacity of contractee with, and lessee of the Government with respect of facilities that would otherwise not have been available in a time of crisis, an instrumentality, or quasi-instrumentality, of the United States, and its activities as such constitutionally immune from State taxation?

(4) Does the tax constitute an unconstitutional burden on the Government of the United States?

(5) Are the activities of the petitioner immune from imposition of the tax because conducted upon a United

States reservation as to which the State of West Virginia reserved no concurrent jurisdiction?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Supreme Court of Appeals of West Virginia has decided a constitutional question of the utmost importance, probably in conflict with applicable decisions of this Court, such decisions being cited in the brief by counsel which accompanies this petition.

(2) The Supreme Court of Appeals of West Virginia has decided that a state may tax as a privilege, an activity consisting solely of the manufacture of armor plate and deck plate under contract with, and for, the United States Government, Government property and facilities being used. The activities of petitioner were contributory to the highest soverign function of Government — care for the national safety — and it is urged that such activities are beyond the power of state taxation, even though petitioner derived profit therefrom.

(3) The effect of the decision of the Supreme Court of Appeals of West Virginia is, through state taxation, to lay a direct burden upon the United States in the exercise of sovereign functions.

PRAYER

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of, and under, the seal of this Honorable Court, directed to the Supreme Court of Appeals of West Virginia, commanding that Court to certify, and send to this Court, for its review and determination, on a day certain to be named therein, a full

and complete transcript of its Case No. 9668, entitled *Carnegie-Illinois Steel Corporation, a corporation, Appellant,* v. *George P. Alderson, in his official capacity as Tax Commissioner of the State of West Virginia, and in his individual right, Appellee,* and that the decree of the said Supreme Court of Appeals of West Virginia entered in said cause on July 3, 1945, may be reversed, and the decree of the Circuit Court of Kanawha County entered on the 16th day of February, 1944, be reversed, and this petitioner held not liable for the tax in question, and that an injunction be issued, and other remedy granted, as prayed for in the bill of complaint, and that this petitioner may have such other and further relief in the premises as to the Court may seem proper.

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